

STATE OF NORTH CAROLINA
COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 03512

<p>■ by and through her parents ■ and ■ ■ Petitioner,</p> <p>v.</p> <p>Craven County Public Schools Board of Education Respondent.</p>	<p>FINAL DECISION</p>
--	------------------------------

THIS MATTER comes before the Undersigned on Respondent's Motion to Dismiss. Petitioners filed the Petition for Contested Case Hearing *pro se* on or about June 11, 2018. Respondent timely filed its Response and a Motion to Dismiss on June 25, 2018. Petitioners responded to Respondent's Motion to Dismiss on July 6, 2018. After reviewing the pleadings, response, and all relevant information in the record, the Undersigned orders as follows:

STANDARD OF REVIEW

Dismissal under Rule 12(b)(6) is proper where one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact which necessarily defeats the plaintiff's claim." *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citations omitted). Conclusory allegations are not sufficient to state a claim under Rule 12(b)(6). "In ruling on a motion under N.C.R. Civ. P. 12(b)(6), a court will not accept mere conclusory allegations on the legal effect of the events a plaintiff has set out if those allegations do not reasonably follow from the plaintiff's description of what happened." *Jordan v. Crew*, 125 N.C. App. 712, 718, 482 S.E.2d 735, 738 (1997).

Dismissal under Rule 12(b)(1) is required when the Petition demonstrates that the Tribunal lacks subject matter jurisdiction over Petitioner's claims. The Office of Administrative Hearings has limited jurisdiction in due process hearings. N.C. Gen. Stat. §115C-109.6(a). ("Any party may file with the Office of Administrative Hearings a petition to request an impartial hearing with respect to any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education of a child, or a manifestation determination.") Matters not properly the subject of a Petition under Chapter 115C, Article 9 of the North Carolina General Statutes are outside this Tribunal's jurisdiction and therefore subject to dismissal under Rule 12(b)(1).

A court may grant a motion to dismiss “only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir.1999). Further, “when a defendant asserts that the complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6) and assume the truthfulness of the facts alleged.” *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009). In that regard, “the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction.” *Id.* at 192.

If it is apparent on the face of the complaint when a claim accrued, then a decision regarding the application of the statute of limitations may be made at the motion to dismiss phase. *See, e.g., Richards v. Fairfax Co. Sch. Bd.*, 798 F.Supp. 338, 340-41 (E.D. Va. 1992), *aff’d sub nom. Richards v. Fairfax Cty.*, 7 F.3d 225 (4th Cir. 1993) (dismissing untimely IDEA and state law claims after determining when the claims accrued based on the allegations in the complaint); *M.S. v. Fairfax County Sch. Bd.*, 2006 WL 721372 (E.D. Va. 2006) (applying statute of limitations to IDEA claims at motion to dismiss stage); *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 775 (M.D. Pa. 2012) (where Plaintiff failed to plead “that the District withheld . . . statutorily-required information” or that “the district intentionally . . . misrepresented any information” all claims arising outside the limitations period dismissed pursuant to Rule 12(b)(6)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In considering this Motion, the Undersigned accepts the facts pled in the Petition as true.

2. Petitioner [REDACTED] is a [REDACTED]-year-old former student in the Craven County School System. [REDACTED] withdrew from the Craven County Schools after the end of the 201[REDACTED]-201[REDACTED] school year.

3. Prior to withdrawing from public school, [REDACTED] was identified by the Craven County Schools as a student with a disability. At the time she withdrew from public school, [REDACTED] had a current IEP in place.

4. During the 2017-2018 school year, [REDACTED] attended [REDACTED] [REDACTED] for [REDACTED], a [REDACTED] school in Craven County, North Carolina.

5. During the 2017-2018 school year, [REDACTED] received special education services from Respondent as a parentally-placed private school student, pursuant to a Private School Services Plan.

6. While [REDACTED] was attending [REDACTED], Petitioners requested “thru [REDACTED]” that [REDACTED] be evaluated for autism. Petition ¶ 27. Petitioners allege that Respondent denied this request “on or about December 2017,” while Petitioner was attending the private school. Petition ¶ 31.

7. Petitioners allege “upon information and belief” that “the majority of students attending private school in Craven County are of Caucasian descent,” and “the majority of those students have been evaluated for identification of special needs,” as opposed to the Petitioner, who is of African-American descent. Petition ¶¶ 29-30.

8. Petitioners’ claims of racial discrimination are not matters “relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education of a child, or a manifestation determination” and are therefore outside the jurisdiction of OAH. N.C.G.S. 115C-109.6(a).

9. Petitioners’ claims arising during the 2017-2018 school year, while she was a parentally-placed private school student, are also outside the jurisdiction of OAH. Due process procedures may not be used to raise complaints that an LEA has failed to meet the requirements of 20 U.S.C. § 1412(a)(10)(A) regarding the provision of equitable services to parentally-placed private school students. 34 C.F.R. § 300.140.

10. The sole reviewable claim for a parentally-placed private school student is a claim that the district failed to meet the Child Find requirements of 34 C.F.R. § 300.131. 34 C.F.R. § 300.140(b).

11. Because [REDACTED] was identified as a student with a disability by the Craven County Schools throughout the relevant time period, the Petition discloses that Respondent met its Child Find obligation, and the Petition contains no claim reviewable by this Tribunal. *See Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 158 (1st Cir. 2004), *abrogated on other grounds by Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009) (“Once Greenland identified Katie as a child with a disability in September 2001, the district had performed every act reviewable by a hearing officer; any subsequent obligations it had to provide educational services to Katie were matters for the state administrative procedure . . .”).

12. Petitioners have a right to request that [REDACTED] be evaluated for autism by Respondent. SEAs must have in place policies and procedures to ensure that LEAs meet the private school requirements of IDEA. 34 C.F.R. § 300.129. NC Policy 1501-6.2 allows parents of a privately placed student to request an evaluation from the LEA where the child resides, even though the child has been previously evaluated. However, where [REDACTED] was already identified as a student with a disability by Respondent, Petitioners’ complaint that [REDACTED] had not received a specific autism evaluation is a complaint pertaining to services provided to a parentally-placed private school student and, therefore, is outside the jurisdiction of OAH. Petitioners must utilize the State Complaint process for this claim. 34 C.F.R. § 300.140.

13. Likewise, Petitioners’ complaints about the nature or content of the services provided under [REDACTED]’s Private School Services Plan, and the handling of her educational records, are outside the jurisdiction of OAH and must be raised through a State Complaint. In their “Reply to Respondent’s Motion to Dismiss,” Petitioners appear to acknowledge that they were aware when they filed these claims that they were outside the jurisdiction of OAH.

14. Petitioners' remaining claims regarding [REDACTED]'s educational services provided while she was enrolled in the Craven County Schools during the 2016-2017 school year are barred by the applicable statute of limitations.

15. A party filing a petition for contested case hearing with the Office of Administrative hearings must do so within one year of the time the party knew or reasonably should have known about the alleged action that forms the basis of the petition. N.C. Gen. Stat. § 115C-109.6(b); N.C. 1504-1.12(e). A cause of action under the IDEA arises when Petitioners "knew of the facts that gave rise to th[e] injury, whether or not they knew they were actionable." *Richards v. Fairfax County Sch. Bd.*, 798 F. Supp. 338, 341 (E.D. Va. 1992).

16. This Petition was filed on June 11, 2018, more than one year after the end of the 2016-2017 school year. *See* N.C.G.S. § 115C-84.2(d).

17. The one-year limitations period "shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent." 20 U.S.C. § 1415(f)(3)(D); N.C.G.S. § 115C-109.6(c).

18. Petitioners have not alleged facts that would support application of the exceptions provided in 20 U.S.C. § 1415(f)(3)(D) or N.C.G.S. § 115C-109.6 that the Respondent had made specific misrepresentations or withheld information which prevented them from filing a timely petition regarding the 2016-2017 school year.

19. The Petition alleges that Petitioners "fully participated in the IEP process" and were aware of the alleged shortcomings in her educational services prior to the end of the 2016-2017 school year. Petition ¶¶12, 16-18, 21-11. The Petition does not allege that any statutorily mandated notices were withheld, nor that any employee of Respondent misrepresented to Petitioners that the issues had been resolved.

20. This Tribunal is granted limited subject matter jurisdiction by statute but lacks jurisdiction to hear any claims falling outside the one-year statute of limitations established by N.C.G.S. § 115C-109.6.

ORDER OF DISMISSAL

It is therefore ordered and adjudged that the Petition must be dismissed for lack of subject matter jurisdiction. Petitioners' claims regarding the 2017-2018 school year are outside the jurisdiction of OAH and can only be raised in a state complaint. Petitioners' claims regarding racial discrimination do not arise under the IDEA and are therefore outside the limited jurisdiction of OAH.

Finally, Petitioners' claims related to the 2016-2017 school year arose outside the relevant statute of limitations and are therefore also outside the jurisdiction of OAH. Based upon the foregoing mixed Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is **GRANTED**, and the Petition is **DISMISSED WITH PREJUDICE** in its entirety.

NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision. Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED.

This the 24th day of July, 2018.



Stacey Bice Bawtinheimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Saleisha Nadia Averhart Esq.
Bowens & Averhart, PLLC
saleisha@bowens-averhart.com
Attorney for Petitioner

Teresa Silver King
NC Department of Public Instruction
due_process@dpi.nc.gov
Affiliated Agency

Eva Blount DuBuisson
Tharrington Smith, LLP
eva@tharringtonsmith.com
Attorney for Respondent

This the 24th day of July, 2018.



Donna R Buck
Paralegal
N. C. Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Phone: 919-431-3000